Order

Entered: July 30, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

ADM File Nos. 2002-40 and 2003-31

Amendment of Rules 7.302, 7.304,
and 7.315 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Rules 7.302, 7.304, and 7.315 of the Michigan Court Rules are amended, to be effective August 1, 2003.

[The present language is amended as indicated below by underlining to show new text and strikeover to show deleted text.]

Rule 7.302 Application for Leave to Appeal

(A) - (F) [Unchanged.]

(G) Decision.

(1) Possible Court Actions. The Court may grant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument <u>on applications unless ordered by the Court</u>. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk.

(2) - (4) [Unchanged.]

(H) [Unchanged.]

Rule 7.304 Original Proceedings

(A) - (D) [Unchanged.]

(E) Decision. ~~There is no oral argument on the complaint.~~ The Court may set the case for argument as on leave granted, grant or deny the relief requested, or enter another order it finds appropriate, including an order to show cause why the relief sought in the complaint should not be granted. There is no oral argument on complaints unless ordered by the Court.

Rule 7.315 Call and Argument of Cases in Supreme Court

(A) [Unchanged.]

(B) Argument. In a calendar case, the time allowed for argument is 30 minutes for each side unless the Court orders otherwise. When only one side is represented, only 15 minutes is allowed unless the Court orders otherwise. The time for argument may be extended by the Court on motion filed at least 14 days before the session begins or by the Chief Justice during the argument. Oral argument should emphasize and clarify the written argument appearing in the brief filed. The Court looks with disfavor on an argument that is read from a prepared text.

Staff Comment: The July 30, 2003, amendments of MCR 7.302 and 7.304, effective August 1, 2003, gave the Supreme Court discretion to order oral argument before deciding whether to grant leave to appeal or to take other action with regard to applications for leave to appeal and original proceedings. The amendment of MCR 7.315 gave the Court discretion to shorten the time for oral argument in calendar cases.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Markman, J. (*concurring*). One would never know it from reading the three dissents, but the principal effect of these amendments will be to afford something beyond summary review to more cases being appealed to this Court. The allowance for oral argument in MCR 7.302(G) and MCR 7.304(E) does not come at the expense of fuller oral argument, but as an alternative to no oral argument at all. By the proposed amendments, the Court creates an alternative procedure in those cases in which a majority of the Court believes that an error or an injustice will result from a lower court decision, yet in which there is not a sufficiently far-reaching or difficult legal issue to warrant using

the Court's limited resources for full oral argument.[1] Contrary to the dissents, the amendments do not constitute a half-glass approach to oral argument; instead, they constitute an *additional* half-glass approach to what already exists. The amendments will afford additional opportunity for oral argument in more than 2,000 cases each year that currently receive no such argument at all.

Despite the fact that more litigants will be afforded oral argument, the dissents are unhappy that the additional arguments to be heard by this Court will be decided, not very remarkably, by a majority vote. Such a vote is consistent with MCR 7.316(C), which specifies that the Supreme Court acts by the concurrence of a "majority" of justices voting; MCL 600.211(3), which specifies that a "majority" of justices shall constitute a quorum for hearing cases and transacting business; and Const 1963, art 6, § 2, which specifies that this Court consists of "seven justices," and, in the absence of an alternative constitutional rule, conveys that each justice plays an equal part in the judicial decision-making process. The narrow *exception* to majority rule, allowing peremptory relief only with the concurrence of five justices–an exception that is not set forth in the law or in the court rules but only in our internal operating procedures[2]–will continue to apply in cases decided without oral argument (absent an emergency), but will simply not be extended to cases in which there *is* oral argument.[3]

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[1] As Justice Cavanagh recognizes in his dissent, "During the past two decades innumerable applications not meriting the consideration a grant of leave would afford have been denied even though four members of this Court may have wished to impose a different result." Justice Weaver likewise observes, "Because there is simply not the time to provide oral argument on every decision of this Court, calendar case status is reserved for those cases that raise legal issues of importance to the citizens of the state."

[2] Even this internal operating procedure has not been followed on all occasions since its adoption in 1983. See, e.g., *Providence Hospital v Morrell*, 431 Mich 194 (1988).

[3] While the amendment of MCR 7.315(B) will allow the Court the option of reducing the time allotted for oral argument in calendar cases, any claim that *every* calender case merits nothing less than sixty minutes of argument is simply baseless. In Ohio, for example, only fifteen minutes is allotted to each side for oral argument in cases not involving the death penalty, and the Court may vary the time of oral argument. Ohio S Ct R IX(5)(A). In Indiana, each side receives the amount of time set by court order. Ind Ct R 53(A). In the United States Court of Appeals for the Sixth Circuit, which encompasses Michigan, parties are provided fifteen minutes of oral argument per side. 6 Cir R 34(f). Indeed, even as revised, MCR 7.315(B) allows the Chief Justice to extend the time for oral argument during the argument itself, and this is routinely done.

To restate, the proposed amendments will afford more litigants more opportunity for oral argument, without diminishing the number of litigants whose cases receive full oral argument. Contrary to the concerns of Justice Weaver, we believe that these amendments will enhance, not diminish, the "public's access to this Court's decision-making process," and they will afford more, not less, "process" to litigants.

Corrigan, C.J., and Taylor and Young, JJ., concurred with Markman, J.

Cavanagh, J. I dissent from the adoption of the amendments of MCR 7.315(B) and MCR 7.302(G) for the same reasons so aptly articulated by my Sisters Weaver and Kelly. The bench and bar should know that these amendments are a thinly veiled end run, by four members of this Court (a majority, to be sure), around the Court's twenty-year-old internal restraint on taking peremptory action on applications for leave. During the past two decades, innumerable applications not meriting the consideration a grant of leave would afford have been denied even though four members of this Court may have wished to impose a different result. Now, the current majority, frustrated in its efforts to effect its desired result by a per curiam opinion or peremptory order because of the lack of a fifth vote, has devised these amendments to fast track applications to its desired result. It might better be described as an Order to Show Cause procedure to allow the party destined to lose to argue why the train's destination is incorrect.[1]

It is ironic that this internal five-vote restraint grew out of a concern, primarily by the Prosecuting Attorneys Association of Michigan, over peremptory action by this Court on letter requests for review by prisoners. However, that concern also prompted this Court to unanimously agree that peremptory action should only be warranted where the issue was narrow, uncomplicated and nonjurisprudential and the result was clear to at least five members of the Court. I still share this view and, accordingly, must dissent from the facade the simple majority erects with these amendments.

Kelly, J., concurred with Cavanagh, J.

Weaver, J. I dissent from the four-vote majority's adoption of amendments to Michigan Court Rules 7.315(B) and 7.302(G) and from the same four-vote majority's related, but internal, decision in ADM 2003-31 to rescind a longstanding internal rule that

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[1] Another concern generated by this mini-argument-on-applications docket is that apparently notice would be given only to the immediate parties, thus depriving the bench and bar of an adequate opportunity to determine if intervention as amicus might be warranted.

required the vote of five justices before granting peremptory relief on applications for leave to appeal.

Relevant to these three administrative decisions is an April 6, 2003, editorial by the Detroit Free Press, entitled "Court Secrecy—Public should be able to see, hear justices." The editorial praised this Court for having oral arguments televised, while criticizing the United States Supreme Court for not doing so:

> Oral arguments and written decisions offer the only insight into court's decision-making. The proceedings should be completely documented — and available for viewing. Cameras are allowed in all Michigan courts so citizens can see how this pivotal branch of government conducts the people's business.

I write to explain why the three administrative decisions at issue potentially diminish rather than enhance the public's access to this Court's decision-making process.

It is necessary to understand how cases proceed in the Supreme Court. When a party files an application for leave to appeal, this Court may take one of four actions:

(1) Grant the application, making the case a calendar case.

- "A case in which leave to appeal has been granted, or a case initiated in the Supreme Court which the Court determines will be heard and argued, is termed a 'calendar case.'" MCR 7.312(A). Calendar cases make up a small but important percentage of this Court's work. In calendar cases, after full briefing, input from amicus briefs, and oral argument, the Court issues opinions on undecided areas of the law, or reconsiders prior precedent.

(2) Deny the application.

- When this Court denies leave to appeal, thus refusing to hear the case, the lower court decision from which appeal is sought is left intact. A denial of leave to appeal has no precedential value, and this Court expresses no view regarding the merits of the legal questions addressed in the Court of Appeals opinion.

(3) Enter a final decision, known as a per curiam opinion.

- A per curiam opinion is "by the court; said of a judicial opinion presented as that of the *entire* court rather than that of any one judge," *Webster's New World Dictionary, 2d College Edition* (emphasis added), "a very brief usually *unanimous* decision of a court rendered without elaborate discussion." *Webster's 9th New Collegiate Dictionary* (emphasis added).

(4) Issue a peremptory order.

- A peremptory order may be entered after the Court has received an application for leave to appeal, without the Court granting leave to appeal. Peremptory relief should only be granted on cases in which the law is settled. [MCR 7.302(G)(1).]

These distinctions are significant, and directly affect how cases are handled within the Court. They should be consistently followed and not redefined.

The amendment of MCR 7.315(B) affects oral argument in calendar cases, while the amendment of MCR 7.302(G) and the abandonment of the five-vote requirement for peremptory relief in ADM 2003-31 affect per curiam opinions and peremptory orders.

To summarize, the amendment of MCR 7.315(B) opens the door to shorter oral argument in cases in which leave to appeal has been granted, where previously, a minimum length of argument was guaranteed. The amendment of MCR 7.302(G), in combination with ADM 2003-31's abandonment of the five-vote requirement for peremptory relief fails to adequately restrain this Court's exercise of its peremptory powers.

Taken together, these administrative decisions blur the distinction between calendar cases and peremptory decisions. They elevate efficiency over fair and sufficient process; they facilitate judicial activism rather than judicial restraint.[1] It is imperative for justices to commit to self-restraint in exercising their tremendous power to define and interpret the laws of the State of Michigan.

MCR 7.315(B)

The amendment of MCR 7.315(B) allows the Court to alter downward the time allowed for oral argument for each side in calendar cases. The Court already has and exercises the ability to grant the parties more time during oral argument as needed;[2] thus, this amendment only grants the Court the power *to decrease the time* that the parties would receive for oral argument in calendar cases.

The current provision for 30 minutes of argument per side (or 15 minutes when

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[1] Judicial restraint requires judges to exercise self-discipline in interpreting the law. Judges should use the powerful responsibility of interpretation not as a sword to promote a judge's personal agenda, or the agendas of supporters, but as a shield to protect the constitutional and statutory rights of the people and the constitutional acts of the legislative and executive branches.

[2]MCR 7.315(B).

only one side is represented)[3] is the minimum time that parties should be given to publicly argue and present their positions in calendar cases. Because there is simply not the time to provide oral argument on every decision of this Court, calendar case status is reserved for those cases that raise legal issues of importance to the citizens of the state. For example, they are the proper vehicle for the Court to address unresolved legal questions or to reexamine prior decisions of the Court.[4]

Oral argument is an essential component of the decision-making process, and plays an important role in assisting the justices in reaching a decision. Oral argument is the only opportunity that an attorney will have to speak directly to the justices about the case, learn of the justices' concerns, and respond to those concerns. Further, oral argument provides an opportunity for the public to view some of the workings of the Supreme Court. On important cases, courts should not make final judgments without having full oral argument.

Because this amendment would potentially decrease the citizens' insight into the Court's decision making, and for the reasons previously stated, I dissent from this amendment of MCR 7.315(B).

MCR 7.302(G) and ADM 2003-31

The amendment of MCR 7.302(G) allows the possibility of oral argument on applications for leave to appeal where there previously was no such opportunity. However, this new possibility for oral argument on applications for leave to appeal is just that, only a possibility, and there is no guarantee that the Court will allow any or an adequate length of time for oral argument. In combination with the new internal rule, ADM 2003-31, the amendment of MCR 7.302(G) allows this Court to issue per curiam opinions with the vote of only four of the seven justices—a mere majority—after what may be only minimal opportunity for oral argument. Accordingly, I dissent from both the amendment of the court rule and the adoption of the new internal rule on peremptory relief.[5]

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[3]MCR 7.315(B).

[4]Each year, this Court receives between 2,000 and 2,500 applications for leave to appeal, and each year this Court grants leave to appeal in approximately 3% of these cases.

[5]This internal rule on peremptory relief should not be an internal rule, but should become part of the published Michigan Court Rules. While not published, administrative minutes of this Court's weekly conferences are archived and may be accessed by the public at the office of the Clerk of the Court. As can be understood in light of ADM 2003-31, some of these "internal" administrative decisions are of significance to the public and the administration of justice. However, it is nearly impossible to follow and access these decisions because they are kept chronologically and not indexed by topic.

When a party files an application for leave to appeal, this Court may take one of four actions: grant the application making the case a calendar case, deny the application, enter a final decision, known as a per curiam opinion, or issue a peremptory order. MCR 7.302(G)(1). The amendments of MCR 7.302(G) and ADM 2003-31's abandonment of the five-vote requirement for peremptory relief concern per curiam opinions and peremptory orders.

For the twenty years since 1983, the Court's internal rules have required that five of the seven justices—more than a bare majority—agree with a per curiam opinion or peremptory order before such an opinion or order can be issued on an application for leave to appeal:

> Peremptory disposition of a case by order or PC opinion may be made upon the concurrence of five Justices provided that the dissenting Justice(s) agree that the disposition may be released over their dissent. (See, August 17-18, 1983, minutes of the Adm. Conference, item 1.)

The five-vote requirement for per curiam decisions or peremptory orders in cases where leave to appeal has not been granted and there is no guarantee of sufficient oral argument is good policy. It is an important self-discipline on the tremendous powers of the justices of the Supreme Court. The five-vote requirement helps insure that a bare majority of only four of the seven justices cannot decide new legal questions or revisit and overrule precedent without opportunity for full briefing, amicus briefing, and sufficient oral argument.[6]

Regrettably, under ADM 2003-31, the Court has rescinded the long-established five-vote rule for per curiam opinions and peremptory orders. The Court has enacted a new internal rule, under which per curiam opinions may be issued on the votes of only

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[6]In his statement, Justice Markman asserts that deciding the per curiam opinions on four votes is consistent with the Michigan Constitution, art 6, § 2. However, art 6, § 2, which provides in pertinent part "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law," only addresses the number of justices authorized to be on the Supreme Court. It does not address the issue of how many votes are needed to decide a case.

Similarly, the statute to which Justice Markman refers, MCL 600.211, does not specify the number of votes needed to decide a case. The statute provides that a majority of the justices shall constitute a *quorum* for hearing cases and transacting business. However, a "quorum" is "the number of members of a group required to be present to transact business or carry out an activity legally, usually a majority." *Random House Webster's College Dictionary* (1997). Thus, the statute only establishes the minimum number of justices required to *hear* a case, not the number of votes needed to *decide* a case.

four justices when there has been oral argument on the application pursuant to the newly-amended MCR 7.302(G), and peremptory orders may be issued on the votes of four justices when "a majority of Justices conclude that emergency circumstances warrant the issuance of such an order." The new rule reads as follows:

> -The Court shall not issue any per curiam opinion unless it is signed by five Justices, *except where such opinion issues following oral argument on the application.*
>
> -The Court shall not issue any peremptory order unless it is signed by five Justices, *except where a majority of Justices conclude that emergency circumstances warrant the issuance of such an order.* (See, July 10, 2003, minutes of the Adm. Conference, item 4) (emphasis added).

This new rule is unclear, nonspecific, and leaves itself open for abuse. It sets no minimum length for oral argument on applications and does not define what constitutes an emergency—in effect it allows four votes of the Court to create an emergency. There should be some means to ensure that a designated "emergency" is not merely an opportune rush to judgment. Further, in a true emergency, five justices should be able to agree on a decision.

The new "mini-oral-argument procedure" is clearly designed to bypass the fifth vote needed to enter per curiam opinions. Unfortunately, the four-vote per curiam rule of ADM 2003-31 does not provide sufficient safeguards to replace the absence of that fifth vote, and will diminish the Court's accountability. Although the mini-oral-argument procedure may markedly increase the number of opinions released by the Court, this Court should not sacrifice fairness for "efficiency."

Under these new rules, if a proposed per curiam opinion garnered only four votes, those four justices could grant two minutes of oral argument on the application, then issue the proposed per curiam opinion based on those same four votes. In effect, this could create a docket of already decided cases, where there are four votes for a predetermined result, and the opinion is already drafted before the oral argument takes place.

The chart below illustrates the recent trend in this Court toward issuing more per curiam opinions on application and fewer opinions on calendar cases, and consequently shows the importance of the change in the rules concerning per curiam opinions.[7] The chart summarizes the number of cases of each type released during the last ten years, as well as the number of applications for leave to appeal that have been filed in each year:

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[7] The information in the chart is based on the annual statistical reports of the Michigan Supreme Court for calendar years 1993 through 2002, and the per curiam opinions published in Michigan Reports during those years.

	per curiam opinions	opinions in calendar cases	applications filed
1993	5	85	2,749
1994	10	98	3,188
1995	11	84	3,173
1996	14	95	2,770
1997	8	80	2,847
1998	17	104	2,436
1999	23	62	2,246
2000	18	65	2,159
2001	23	56	2,291
2002	38	49	2,180

As one can see, the Court has been able to issue an increasingly larger number of per curiam opinions with the five-vote rule in place; hence, there is no need to create a process to allow the Court to issue even more per curiam opinions.

Although I would support actually providing a new opportunity for oral argument to assist the Court in determining what action to take on an application, I oppose the amendment of MCR 7.302(G) because, in light of ADM 2003-31, it is incomplete. If the amendment also provided that there must be five votes for the Court to issue a peremptory order or per curiam decision on an application for leave to appeal, I would be able to support it.

The rules governing the number of votes required for peremptory decisions should not be secreted away among the internal minutes of the proceedings of the Court. The number of votes required for such decisions is of such consequence to the administration of justice that it should be in the published Michigan Court Rules, where it would be easy to find and obtain.

Consequently, I propose for publication and public comment the following amendment of MCR 7.302(G):

(G) Decision.

(1) Possible Court Actions. The Court may grant or deny the application on the votes of four justices. The Court may enter a final per curiam decision, or issue a peremptory order on the application, on the votes of five justices. There is no oral argument on applications unless ordered by the Court. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk.

In summary, I oppose this Court's revocation of the five-vote rule, and the enactment of the rule allowing four-vote per curiam opinions and emergency four-vote peremptory orders. I also dissent from the amendment of MCR 7.302(G) because it does not incorporate within the court rule a requirement that there be five votes for the Court to issue a peremptory order or per curiam decision on an application for leave to appeal. The internal rule requiring five votes has been in place for 20 years.

It is imperative for the Justices to commit self-restraint in exercising their tremendous power to define and interpret the laws of the State of Michigan. Rather than abrogate this internal rule of judicial restraint for the sake of "efficiency," I would retain the rule and add the five-vote requirement to the Michigan Court Rules.

Cavanagh and Kelly, JJ., concurred with Weaver, J.

Kelly, J. I would make no change in the Court's existing practice with respect to per curiam opinions and peremptory orders.

No adequate reasons have been advanced for discontinuing the requirement that a per curiam opinion be signed by at least five justices. Strictly speaking, a per curiam opinion should be issued only when the opinion is the product of the whole court. In recent years, the Court has departed from that rule to allow an opinion to be issued as a per curiam with one or two dissenting opinions attached. The change here departs even further, allowing a mere majority to issue a per curiam, while three justices disagree.

I believe that the change moves the Court in the wrong direction. If a case presents sufficiently grantworthy issues to justify oral argument, it should be accorded full briefing and a full authored opinion, unless at least five justices agree to bypass the normal process. Likewise, if the Court wishes not to allow full briefing and full oral argument but to issue more than a peremptory order, it should do so only if at least five justices agree, as has been the practice for years.

The change today appears to be intended to permit a mere four justices to issue a per curiam opinion without the benefit of full briefing of the issues and with highly abbreviated oral argument. I view the change as a further eroding of this Court's commitment to providing due deliberation to the cases brought before it.

Similarly, in the past, the Court did not take peremptory action without the agreement of at least five justices. The reason was that peremptory action does not give the parties the opportunity to fully brief and argue their case. It has been felt appropriate to use this procedure only where the correct ruling was so obvious that at least five of the seven justices agreed with it and saw no need for additional input from counsel. The change today permits a bare majority to issue a peremptory order disposing of an appeal while declaring that "emergency circumstances warrant" it.

As with the change in the per curiam rule, no adequate reason has been given justifying the departure from established peremptory order practice . "Emergency circumstances" are not defined. This amendment can be used by a mere majority of the justices to prevent full briefing and oral argument that three of their colleagues believe would help the Court reach a correct ruling. For those reasons, I oppose it.

Cavanagh, J., concurred with Kelly, J.

July 30, 2003

Clerk